



UNIVERSITY OF
TORONTO
FACULTY OF LAW



LEGAL PROCESS, PROFESSIONALISM & ETHICS (LPPE)

FIRST YEAR 2009-10

VOLUME 1

FALL 2009

Professor Ayelet Shachar

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UNIVERSITY OF
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LEGAL PROCESS, ETHICS, AND PROFESSIONALISM (LPPE) First Year 2009-2010

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This course provides an introduction to legal process, with special emphasis on civil litigation, access to justice, the adversarial process and alternative approaches to dispute resolution. It examines the essentials of civil litigation (including standing, intervention, limitation periods, discovery and privilege, multi-party litigation, and class actions). It also covers the doctrines of territorial jurisdiction, *forum non conveniens*, and choice of law in multilevel governance regimes, as well as topical issues of transnational litigation and restorative justice. Throughout the course, special emphasis will be placed on addressing the fundamentals of legal process in a broader theoretical context.

The course will consist of four parts. The first part will provide an introduction to the common law system, legal reasoning, and the leading analytical frameworks of legal thought. The second part will identify the roles and professional duties of lawyers and judges. The third part will focus on the civil litigation process and its alternatives. The fourth and final part of the course will explore the new “transnational” frontiers of legal process, focusing on the relationship among domestic, regional, and international law and justice.

This course will also include an intensive week on Legal Ethics and Professionalism from November 2 to 6, 2009. The intensive week will bring together the entire first-year class and esteemed members of the profession to discuss professionalism and various ethical issues.

Reading Materials

The reading material is assembled in a course packet, *Legal Process, Ethics & Professionalism*, 2 volumes, edited by Professor Shachar (Faculty of Law, University of Toronto, 2009). The course packet is available for purchase at the bookstore in the basement of the Law School. Additional copies will be placed on short-term reserve at the Bora Laskin Law Library.

Evaluation

The evaluation for this course consists of regular class attendance and participation (5% of the final grade), one take-home writing assignment (2,500 words) to be submitted on the day of the final examination (25% of the final grade) and an open-book two-hour final examination (70% of the final grade).

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- G. L. Gall, "The Operation of Stare Decisis," in *The Canadian Legal System*, 5th ed. (Carswell, 2004), 431-433 65
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- ### 1.4 Legal Formalism and Alternative Jurisprudential Conceptions; Rules and Standards
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